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No. 74, ORIGINAL

In The

Supreme Court of the United States

October Term, 1988

STATE OF GEORGIA,

Plaintiff,

v.

STATE OF SOUTH CAROLINA,

Defendant.

ON THE REPORTS OF THE SPECIAL MASTER

REPLY BRIEF FOR THE STATE OF GEORGIA

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ON THE REPORTS OF THE SPECIAL MASTER

REPLY BRIEF FOR THE STATE OF GEORGIA

SUMMARY OF ARGUMENT

I.

The Special Master correctly determined that the changes in the Savannah River in the areas of south-eastern Denwill and Horseshoe Shoal were avulsions which did not move the boundary between Georgia and South Carolina. The evidence supports his conclusion that the changes could not be deemed accretions, since they resulted directly from the construction of navigation works and the deposit of dredge spoil material by the United States Army Corps of Engineers. The boundary

between the two states was not relocated by the actions of the Corps of Engineers.

II.

The relevant principles of international law provide that a lateral seaward boundary between two states should be an equidistant line, unless historic title or special circumstances require otherwise. The Special Master has used the principles of equidistance, historic title and special circumstances to fashion an equitable division of the territorial sea between the two states. South Carolina's theory that the coastal fronts of the entire coasts of the two states should be determinative of the boundary in the territorial sea has no legal support and was wisely rejected by the Special Master.

ARGUMENT

I.

THE SPECIAL MASTER CORRECTLY CONCLUDED THAT THE CHANGES IN THE SAVANNAH RIVER IN THE AREA OF SOUTHEASTERN DENWILL AND HORSESHOE SHOAL WERE AVULSIONS AND THUS DID NOT CHANGE THE INTERSTATE BOUNDARY.

South Carolina has excepted to the recommendations of the Special Master regarding an area known as southeastern Denwill and an area known as Horseshoe Shoal. S.C. Exceptions I and II.[1] Southeastern Denwill and

[1] This brief will refer to the Exceptions of the State of South Carolina as "S.C. Exceptions" and to the Brief for the

(Continued on following page)

Horseshoe Shoal are the only areas where the Special Master has recommended that the boundary be located north of the current northern channel of the Savannah River.[2] His recommendation is based on a determination that the changes in the Savannah River in these two areas were avulsive and did not change the boundary; accordingly, the Special Master has located the boundary in the geographic middle of the river as it existed in 1855, prior to the avulsive changes. 2nd Report, App. D; Ga. Brief, App. B.

A. ACTIONS OF THE UNITED STATES ARMY CORPS OF ENGINEERS TO IMPROVE NAVIGATION OF THE SAVANNAH RIVER, FIRST BY CONSTRUCTION OF TRAINING WALLS AND THEN BY THE DEPOSIT OF DREDGED MATERIAL, DIRECTLY RESULTED IN THE CHANGES IN THE RIVER'S COURSE AND THE FORMATION OF THE LAND IN DISPUTE AT SOUTHEASTERN DENWILL AND HORSESHOE SHOAL.

The Special Master's conclusion that the changes in the river at Southeastern Denwill and at Horseshoe Shoal

(Continued from previous page)

State of South Carolina in Support of Its Exceptions as "S.C. Brief". The Exceptions of the State of Georgia and the Brief for the State of Georgia in Support of Its Exceptions to the Reports of the Special Master will be similarly abbreviated, i.e. "Ga. Exceptions" and "Ga. Brief".

[2] South Carolina is apparently offended by the fact that the line crosses on to the north bank of the Savannah River, S.C. Brief at 6, 16. This concern is of no great moment. "Situations where land of one state comes to be on the 'wrong' side of its boundary river are not uncommon." *Ohio v. Kentucky*, 444 U.S. 335, 340 (1980) (citations omitted).

were avulsive rather than accretive and therefore did not effect a relocation of the interstate boundary, 1st Report at 67-75, 87, 103, relies in large part upon documents and testimony submitted by Georgia's expert witness Col. Paul W. Ramee, former District Engineer of the Savannah District of the U.S. Army Corps of Engineers and now a consulting civil engineer. 1st Report at 67-71. South Carolina introduced no evidence and no witness to counter the testimony and opinions offered by Ramee. 1st Report at 68 n.49. Ramee testified that he had reviewed the annual reports of the U.S. Army Corps of Engineers, maps and numerous documents to determine what effect the navigation works had on the formation of land on the northern bank of the Savannah River. T-VIII-916-918.[3]

1. Southeastern Denwill

The history of the development of southeastern Denwill is best illustrated by reference to a composite of maps from 1855 to 1978, Ga. Ex. 464, attached to this Brief as Appendix G.[4] Prior to any work by the Corps of Engineers in the area of southeastern Denwill, the navigation channel north of Elba Island was a broad open

[3] Appendix C to the First Report is a copy of Ga. Ex. 316 and Ga. Ex. 320, a map and overlay prepared by Ramee which show the works installed by the U.S. Army Corps of Engineers beginning in the late 19th Century, the date of each structure and the land which formed as a result thereof.

[4] The Brief for the State of Georgia in Support of Its Exceptions to the Reports of the Special Master includes Appendices A through F. For ease of reference, the appendices to this brief are labelled Appendices G and H.

expanse which in the view of the Corps of Engineers was excessively wide. Ga. Ex. 301 at 1143-44 (Annual Report of the Chief of Engineers, 1882). Beginning in 1881 the Corps undertook a number of steps to improve the navigation channel in this area by restricting the width of the river, thereby increasing the velocity and as a result, the capability of the stream to carry sediment. Ramee Testimony, T-VIII-934. In order to reduce the width of the Savannah River, the Corps of Engineers relocated the northern bank of the Savannah River at southeastern Denwill over one-half mile south of its original location. 1st Report, App. C (Ga. Ex. 316, 320). The relocation was accomplished by construction of the north Elba Island training wall in 1891-1895, the sedimentation which naturally occurred behind the wall, and the deposit of dredged material behind the training wall. Ramee Testimony, T-VIII-943, 962.[5]

As Appendix G clearly shows, the land in dispute did not form as gradual accretion from the South Carolina shore toward the river, as South Carolina contends, which arguably might shift the boundary. Rather, the land built up in the river, immediately behind the training wall, as a result of construction of the wall and the disposal of dredge spoil behind it. T-VIII-959-62, 975. As late as the 1923 chart, the newly-formed land behind the training

[5] While the hydraulic dredge was not introduced into use in the Savannah River until 1908, T-VIII-952, other types of dredges were used starting in the late 19th Century. T-VIII-951-952. Even before the advent of the hydraulic dredge, the deposit of dredged material behind the training wall was a significant factor in the build-up of land behind north Elba Island training wall. T-VIII-942-943.

wall was separated by a narrow channel of water from the South Carolina shore. Appendix G; T-VIII-960-62. The uncontradicted evidence is that the land at southeastern Denwill formed initially as marsh islands adjacent to the training wall and became connected to the South Carolina shore as a result of the placement of fill material. T-VIII-958-59, 960-61, 962.

2. Horseshoe Shoal

The facts also support the Special Master's conclusion that the changes in the Savannah River at Horseshoe Shoal[6] were avulsive and had no effect on the boundary. 1st Report at 87 & n.67, 103. The dam constructed by the Corps of Engineers to block the northernmost channel of the Savannah River between Jones Island and Oyster Bed Island is shown on the 1931 navigation chart, Ga. Ex. 330, the relevant portion of which is attached to this brief as Appendix H. In 1855, the northern channel of the Savannah River was a broad expanse of water between Cockspur Island, Georgia and Turtle Island, South Carolina, roughly divided by the prominent shoal which later became Oyster Bed Island. 1st Report, App. B (Ga. Ex. 156). Oyster Bed Island first emerged as an island in the 1870's or 1880's. 1st Report at 93.[7]

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[6] Horseshoe Shoal is the name given to the area of land which now connects Jones Island and Oyster Bed Island. 2nd Report, App. D., Ga. Brief, App. B.

[7] The development of Oyster Bed Island is discussed in some detail in Ga. Brief at 38-40.

In order to concentrate and direct the flow of water in the preferred channel for navigation south of Oyster Bed Island, wing dams and then training walls were constructed in the area from Jones Island to Oyster Bed Island, beginning in 1885. 1st Report, App. C; T-VIII-949-50. Considerable dredging was required to maintain the required depths in the navigation channel, and dredged material was dumped behind the training walls. T-VIII-956. In 1926-31, the Corps constructed a dam of hydraulic fill approximately two miles long to reinforce the training wall from Jones Island to Oyster Bed Island and to raise it well above the level of mean high water. T-VIII-940, 963-64, 965-66; 1st Report at 71; 1st Report, App. C (Ga. Ex. 316, 320); Appendix H.

The training wall, and later the hydraulic fill reinforcing it, served to dam the channel of the Savannah River running between Jones Island and Oyster Bed Island, which previously had been the main channel for navigation. T-VIII-949. The uncontroverted evidence is that the principal cause of the formation of the land between Jones Island and Oyster Bed Island, now known as Horseshoe Shoal, was the dredged material placed there by the Corps of Engineers. T-VIII-974,975.[8] The

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[8] South Carolina notes, correctly, that sedimentation occurred prior to installation of the hydraulic fill dam. S.C. Brief at 14. Such buildup was not the result of natural sedimentation alone; dredged material was routinely dumped behind the training walls to keep the material from reentering the navigation channel. T-VIII-953, 956. Despite shallowing in the area, the last chart prior to installation of the hydraulic fill dam shows that no land above mean high water had formed behind the training wall and depicts an area of open water over one mile wide immediately upstream of Oyster Bed Island. Ga. Ex. 329.

earthen fill dam across the channel of the Savannah River between Jones Island and Oyster Bed Island is clearly shown on Appendix H. It was this evidence upon which the Special Master quite correctly relied in concluding that the blocking of the northernmost channel of the Savannah River in the area between Jones Island and Oyster Bed Island was an avulsive change which did not change the boundary. 1st Report at 71-72, 75.

B. THE LAND FORMED AT SOUTHEASTERN DENWILL AND HORSESHOE SHOAL AS THE DIRECT, INTENDED AND NECESSARY RESULT OF THE ACTIONS OF THE UNITED STATES ARMY CORPS OF ENGINEERS IS NOT ACCRETION WHICH MOVES THE LOCATION OF THE BOUNDARY BETWEEN GEORGIA AND SOUTH CAROLINA.

South Carolina attempts to characterize the formation of southeastern Denwill and Horseshoe Shoal as accretion, and contends that those areas are additions to the South Carolina shore which should move the location of the boundary between Georgia and South Carolina. As set forth above, the facts in the record clearly show that the changes were not accretive in nature, as the Special Master held. Neither does the law support South Carolina's position.

As the Special Master notes, 1st Report at 75, it is axiomatic that while a boundary changes with accretion and erosion, an avulsion does not vary the boundary.[9]

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[9] *See, e.g., Mississippi v. Arkansas*, 415 U.S. 289, 291 (1974); *Kansas v. Missouri*, 322 U.S. 213 (1944); *Arkansas v. Tennessee*, 246 U.S. 158, 173 (1918).

The Court's holding in *Arkansas v. Tennessee* correctly states the distinction between accretion and avulsion and notes that "[I]f the stream from any cause, *natural or artificial*, suddenly leaves its old bed and forms a new one, by the process known as avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel . . . ." 246 U.S. at 173 (emphasis added).

While accretion may result from either natural or artificial causes, *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46, 66-68 (1874), the essence of accretion is the gradual deposit of material by the action of the water.[10] Thus, in *County of St. Clair v. Lovingston*, the Court held that the gradual buildup of land along the river was accretion, even though it may have been caused partly or wholly by obstructions placed in the river above the land in question, because "the proximate cause was the deposits made by the river." 90 U.S. (23 Wall.) at 66.

Construction of the dam of hydraulic fill from Jones Island to Oyster Bed Island by the Corps of Engineers clearly cannot qualify as accretion: it was not gradual, and the land was created not by the deposit of sediment by the waters, but by the placement of fill by means of an hydraulic pipeline dredge. The distinction between accretion which forms gradually as a result of an artificial structure and land artificially filled, built up or otherwise reclaimed has long been recognized. *See, e.g., California, ex*

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[10] "Accretion" means "the process by which an area of land is increased by the gradual deposit of soil due to the action of a boundary river . . . ." 5 R. Powell, *The Law of Real Property* ¶ 717(1) at 66-2 (1989) (footnotes omitted).

rel. State Lands Commission v. United States, 457 U.S. 273, 286-87 & n.15 (1982); *Barney v. Keokuk*, 94 U.S. 324, 337 (1876).

Regarding southeastern Denwill, the land formed as a result both of sedimentation caused by the artificial structure and by disposal of dredged material, but the land formed initially as marsh islands behind the training wall, on the Georgia side of the boundary, and then built toward the South Carolina shore. Appendix G. Thus, even if southeastern Denwill could be considered accretion, it was not accretion to the South Carolina shore.[11] During the period in question, 1876-1923, the South Carolina bank of the river was stable; the charts show no accretion to the South Carolina shore. Appendix G.

The Special Master found that "it cannot be successfully argued that accretion played any great part in the attachment of land to the South Carolina mainland . . . ." 1st Report at 72. Thus, while there was undoubtedly some accretion, the Special Master has found that the accretion was only incidental to the artificial creation of new land and artificial attachment of that land to the

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[11] Newly-formed islands in a navigable river, whether natural or artificial, belong to the owner of the bed of the river. *St. Louis v. Rutz*, 138 U.S. 226, 260 (1891). The State of Georgia owns the bed of the Savannah River up to the boundary with South Carolina. Applying South Carolina's theory, the boundary line should have moved northward to Georgia's advantage as a result of accretion to the Georgia land formed behind the training wall. *See Tyson v. Iowa*, 283 F.2d 802, 811 (8th Cir. 1960). Georgia does not advance such a proposition because of the primarily avulsive nature of the changes.

South Carolina shore; as a result, the boundary is not relocated.

South Carolina does not cite any decision of this Court, or indeed any decision of any court dealing with interstate boundaries, in support of its argument that the construction of navigation works by the U. S. Army Corps of Engineers and the filling of a boundary stream by the deposit of dredged material, S.C. Brief at 10, should change the boundary. The decisions of the Court, while not directly addressing the question presented here, indicate that such manmade structures will not alter the location of the interstate boundary. The Court in *Oklahoma v. Texas*, 265 U.S. 493 (1924), held that an extensive addition to the south bank of the Red River was accretion which worked a change in the interstate boundary, overruling a contention that the accretion had been caused by an artificial structure placed in the river. The Court examined the facts and concluded that the accretion had occurred "quite independently of the dam" and that "[t]he wing dam was at most a minor factor in producing the accretion and does not take the change out of the general rule." *Id.* at 498-99, *citing County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46 (1874). The clear implication from *Oklahoma v. Texas* as well as from *County of St. Clair v. Lovingston*, is that a state boundary does not move if the artificial structures are found to have been the major or proximate cause of the change in the river's course.

South Carolina relies upon a string of state court decisions in title disputes which create an exception to the general rules of accretion and avulsion by treating the

deposit of fill material like accretion, based on the equitable interests of the riparian landowner. *See Michaelson v. Silver Beach Improvement Association, Inc.*, 342 Mass. 251, 173 N.E.2d 273 (1961), and other cases cited in S.C. Brief at 12.[12] These decisions are inapplicable to the present case for a number of reasons: this case deals with an interstate boundary, not with title to land; the riparian owners are not parties to this litigation, and South Carolina has made no showing of standing to represent their interests; and there is no use of the riparian property which is in any way interfered with, as southeastern Denwill and Jones Island have never been used for any purpose other than by the Corps of Engineers for the disposal of dredge spoil material, 1st Report at 74 & n.55, 84. Moreover, the State of Georgia was not the party responsible for the deposit of dredged material and should not be estopped from continuing to assert the boundary line established by treaty and confirmed by the Court.[13]

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[12] South Carolina fails to cite any South Carolina authority to support that proposition; indeed, South Carolina law is apparently to the contrary: "South Carolina recognizes the general common law rule that accretions by *natural* alluvial action to riparian or littoral lands become the property of the riparian or littoral owner whose lands are added to." *Horry County v. Woodward*, 318 S.E.2d 584, 586 (S.C. Ct. App. 1984) (emphasis added). The State or other public agency has title to land formed artificially as part of a navigation project if the land is essential to the navigation project. *Horry County v. Tilghman*, 322 S.E.2d 831, 834-35 (S.C. Ct. App. 1984).

[13] The South Carolina brief has greatly over-simplified the case law on the subject of title to artificial "accretion." Certain of the cited cases pretermit any consideration of allocation of

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Construction of the training works, dams and fills in the Savannah River by the U.S. Army Corps of Engineers

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the property if the state were to make a claim. *DeSimone v. Kramer*, 77 Wis. 2d 188, 252 N.W.2d 653, 659 (1977) ("We conclude the land in question belonged to the seller, subject to any paramount rights of the United States or the State of Wisconsin, not here litigated. . . ."); *Gillihan v. Cieloha*, 74 Or. 462, 145 P. 1061, 1063 (1915) ("As against everyone but the state, concerning the rights of which we express no opinion, plaintiffs are the owners of any artificial extension of the land caused by dumping or pumping sands against the bank."). A number of the cases cited by South Carolina acknowledge that a different result might follow if the made land were necessary to navigation or related public interests. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 329 (1973), *rev'd on other grounds, Oregon, ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Michaelson v. Silver Beach Improvement Association, Inc.*, 342 Mass. 251, 173 N.E.2d 273, 277 (1961) (requiring a "substantial relation between the project and the public powers over navigation or the fisheries" if the state is to retain title to the made land); *Lakeside Boating and Bathing, Inc. v. Iowa*, 344 N.W.2d 217, 221-22 (Iowa 1984) ("[I]f the particular placement of dredge fill does not independently serve a recognized paramount governmental purpose, the riparian owner acquires title to the made land as if it had been deposited against the shore by accretion."); *State v. Gill*, 66 So.2d 141, 145 (1953) ("[T]itle . . . is conferred upon the upland owner subject only to the paramount rights of the United States and the State in aid of navigation."). Numerous other cases can be cited for the proposition that land created by the disposal of dredged material is *not* treated like accretion. *See, e.g., United States v. California*, 381 U.S. 139, 177 (1965); *Marine Railway & Coal Co. v. United States*, 257 U.S. 42, 66 (1921); *Barney v. Keokuk*, 94 U.S. 324, 337 (1876) (by the common law, land reclaimed by artificial means from the bed of the river belongs to the crown); *Barakis v. American Cyanamid*, 161 F.2d 25, 29-30 (N.D. Tex. 1958); *Seacoast*

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was pursuant to the paramount right of the government to improve navigation. *South Carolina v. Georgia*, 93 U.S. 4 (1876). The land created by the training works and fill at Denwill and Horseshoe Shoal was formed as an integral part of the navigation project – to improve the depth and navigation of the Savannah River by narrowing the river where it was excessively wide and by blocking any channels subsidiary to the designated navigation channel.

Consideration of the property interests of private land owners is inappropriate at this time, despite South Carolina's claim that the "core" issue deals with riparian rights. S.C. Brief at 11. Once the location of the boundary line between Georgia and South Carolina is established, title to the newly-formed land may be resolved according to the law of each state. *See, e.g., Oregon, ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977). As the Court held in *Arkansas v. Tennessee*, 246 U.S. 158 (1918), title determinations are "limited by the interstate boundary and cannot be permitted to press back the boundary line from where it should otherwise be located." *Id.* at 176; *see also Nebraska v. Iowa*, 406 U.S. 117, 126-27 (1972). Determination of the property rights of private land owners must be secondary and subsequent to the determination of the interstate boundary. The question whether the South Carolina riparian owner would have title to the made land at southeastern Denwill on the

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Real Estate Co. v. American Timber Co., 952 N.J. Eq. 219, 113 A. 489, 490 (1920) (the state retains title to the reclaimed land even if that results in the loss of the riparian character of the privately owned adjacent land).

Georgia side of the boundary must be determined by Georgia law. *See, e.g., Nebraska v. Iowa*, 406 U.S. 117, 126 (1972).

Unquestionably, a dam installed by the Corps of Engineers across a boundary river is an artificial avulsion which cannot relocate the boundary. *See, e.g., Mississippi v. Arkansas*, 415 U.S. 302 at map insert (a "sand fill" across the thalweg of the Mississippi River between Mississippi and Arkansas did not result in the relocation of the state boundary line). While there is no decision of the Court specifically articulating that rule, other courts have considered dams and dredging to be artificial avulsions which do not change political boundaries.[14]

The boundary between Georgia and South Carolina was agreed upon by the two states by the Treaty of Beaufort in 1787 and ratified by Congress. The boundary cannot be changed by Congress without the consent of the states, *Washington v. Oregon*, 211 U.S. 127, 130-31 (1908); much less could it be changed by the U.S. Army

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[14] *See, e.g., Whiteside v. Norton*, 205 F. 5, 13 (8th Cir. 1913) ("Cutting this channel was analogous to avulsion; it could not operate to change the boundary between the States of Wisconsin and Minnesota."); *Witter v. County of St. Charles*, 528 S.W.2d 160, 162 (Mo. Ct. App. 1975) (closing off one channel of the Missouri River by dikes was "artificial avulsion" which did not change the county boundary); *Moore v. Rone*, 355 S.W.2d 398, 404 (Mo. Ct. App. 1962) (relocation of the channel by dredging did not change the boundary); *Durfee v. Keiffer*, 95 N.W.2d 618, 624 (Neb. 1959) (relocation of the course of the river by the Corps did not change the state boundary); *State v. Bowen*, 135 N.W. 494, 495 (Wis. 1912) ("It is obvious that any change wrought in the flow of the water by means of a dam cannot affect the question of state boundary. . . .").

Corps of Engineers. The areas in dispute did not form gradually and naturally as incidental and indirect results of the actions of the Corps of Engineers but as direct and integral elements of the navigation works of the Corps of Engineers. South Carolina's argument that this newly formed land should be deemed the legal equivalent of accretion would, as the Special Master found, "effectively destroy the rule that avulsive processes do not change the boundary line." 1st Report at 75.

II.

THE SPECIAL MASTER CORRECTLY RECOMMENDED THAT NO PART OF BIRD ISLAND IS LOCATED IN SOUTH CAROLINA.

South Carolina's exception regarding Bird Island, S.C. Exception III, requires only scant attention. South Carolina has belatedly asserted that a small sliver of land on Bird Island, south of the north channel of the Savannah River, as shown on 2nd Report, App. C, should be located within the State of South Carolina because it is north of the geographic middle of the Savannah River as it existed in 1855, prior to the major alterations of the river by the U.S. Army Corps of Engineers. As the Special Master has noted, South Carolina has never made any claim to any part of Bird Island, 2nd Report at 21, neither by her Answer and Counterclaim, nor by evidence introduced at the trials in this case, *see, e.g.*, GM-40, 42, 44 (maps introduced showing South Carolina's contentions as to the proper location of the boundary, all of which show a line in the middle of the present north channel of the Savannah River). South Carolina's brief to this Court acknowledges that she has never attempted to claim this

area. S.C. Brief at 16. This exception should be summarily overruled, just as it was summarily disposed of by the Special Master. 2nd Report at 20-21.

III.

THE SPECIAL MASTER'S LATERAL SEAWARD BOUNDARY, ALTHOUGH DRAWN FROM AN INCORRECT STARTING POINT, CORRECTLY APPLIES THE RELEVANT INTERNATIONAL LAW PRINCIPLES OF MARITIME DELIMITATION.

Georgia does not take issue with the Special Master's application of international law principles to draw the lateral seaward boundary. Georgia has excepted only to the starting point of the proposed lateral seaward boundary and has earlier set forth its objections to the use of the navigation channel, rather than the geographic middle of the Savannah River, as that starting point. Ga. Exceptions No. 5; Ga. Brief at 59-61. South Carolina, however, has excepted to the Special Master's treatment of international law principles and has proposed a line which not only perverts those principles but also distorts the geography which controls a lateral seaward boundary. Georgia submits that the geographic middle of the mouth of the Savannah River should be used as the starting point of the maritime boundary between South Carolina and Georgia and that the principles used by the Special Master should be employed to draw that boundary. If, however, the Court declines to follow Georgia's exception on this matter it should uphold the lateral seaward boundary as drawn by the Special Master and overrule South Carolina's exception.

A. THE SPECIAL MASTER'S LATERAL SEAWARD BOUNDARY WAS DRAWN IN FULL CONFORMANCE WITH THE RELEVANT PRINCIPLES OF INTERNATIONAL LAW.

International law has been adopted by this Court to determine maritime boundaries between individual States and to adjudicate the rights of States and the federal Union in offshore areas. *See, e.g., United States v. California*, 381 U.S. 139, 165 (1965); *Texas v. Louisiana*, 426 U.S. 465, 468-70 (1976). The primary source of international law relevant to this case is the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, which specifically addresses the matter of drawing a maritime boundary between two nations' territorial seas as follows:[15]

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line

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[15] Under current international law, a nation's territorial sea may extend twelve nautical miles from its baselines, see U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Art. 3, U.N. Doc. A/CONF.62/122 (not yet in force), reprinted in 21 I.L.M. 1261, 1272 (1982), which may be either the low-water mark along the coast, Art. 5, or some other relevant cartographic feature, such as a closing line for a bay or river mouth, Art. 9, 10, or a low-tide elevation, Art. 13. *Id.* at 1272-73. The United States has recently extended its territorial sea to 12 miles. Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989); 2nd Report, App. F. By virtue of the Submerged Lands Act, the seaward boundaries of Georgia and South Carolina extend to the three-mile limit. 43 U.S.C. § 1312.

> every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

Id. at Art. 12(1); *see also* 1982 U.N. Convention on the Law of the Sea, *opened for signature* December 10, 1982, Art. 15, U.N. Doc. A/CONF.62/122 (not yet in force) reprinted in 21 I.L.M. 1261, 1273 (1982) (where the same language was repeated virtually verbatim). The Court has applied this provision to decide the only case in which the lateral seaward boundary between two States of the United States has been litigated to a decision on the merits. *Texas v. Louisiana*, 426 U.S. 465 (1976). Article 12(1) requires that the lateral seaward boundary be an equidistant line, every point on which is equidistant from the nearest points on the baselines of each state, unless the states agree otherwise or historic title or other special circumstances necessitate deviation from the line.[16]

The Special Master explicitly followed the directives of Article 12(1). He carefully considered those special circumstances which might affect the drawing of an equidistant lateral seaward boundary between Georgia and

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[16] The recently-adopted *Restatement (Third) of the Foreign Relations Law of the United States* confirms the continuing validity of the equidistance-special circumstances rule for the delimitation of lateral seaward boundaries within the territorial sea. *Restatement (Third) of the Foreign Relations Law of the United States* § 516 at 70 (1986). The *Restatement* indicates that this rule is "not controversial." *Id.* at 71, Reporters' Notes 1.

South Carolina. He considered whether the low-tide elevation "Z" should skew the line in favor of South Carolina and decided that it should be ignored. 2nd Report at 12.[17] The Special Master considered and dismissed South Carolina's claim that the navigation channel, or *thalweg*, should be used as the boundary. *Id.* at 14-15. The Special Master did accept, however, that the geography of the respective coastlines was an important factor and could

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[17] The bulge in the then 3-mile territorial sea just seaward of the mouth of the Savannah River is created by the appearance (for the first time) on the 1976 navigation chart of a low-tide elevation (a shoal exposed at mean low water) almost exactly halfway between Tybee Island and Hilton Head Island, seaward of the closing line. This low-tide elevation, labeled "Z" on Georgia exhibits and referred to thusly by counsel, witnesses and the Special Master, is shown on Ga. Ex. II-1 and on Appendix A to the Second Report. The shoal "Z" is part of the baseline from which the territorial sea was measured on the most recent charts. It is the existence of shoal "Z" on the chart and the use of "Z" as a point on the South Carolina baseline which caused the "true equidistant" line referred to by the Special Master, 2nd Report at 15, to veer to the southeast. 2nd Report, App. B, Line 5. Georgia's uncontradicted evidence proved that "Z" was a small and ephemeral shoal which, when surveyed, was barely at the elevation of mean low water, Ga. Ex. II-7, T-II-45, 48, and that at the time of trial "Z" was no longer above mean low water and thus no longer a low-tide elevation forming part of the baseline. T-II-79-83; Ga. Ex. II-16, 17, 18, 19. Low-tide elevations and islets are among the classic examples of minor geographical features which may disproportionately distort an equidistant line and thus may be considered "special circumstances" within the meaning of Article 12(1). 1 Shalowitz, *supra*, at 232 n.55; *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, at para. 57; *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, at para. 128; *Restatement (Third) of the Foreign Relations Law of the United States* § 516 Comment b(1986); T-II-110-113, 281.

modify the strict application of the equidistance rule. He concluded that:

> [W]here the *true* equidistant line involves measurements partially taken from a baseline or closing line and partially from the low-water of the actual coastline, there is ample room for an adjustment of equitable principles which also include a minimal adjustment of the proportionality rule occasioned mainly by the fact that a historic title brought about the location of the inland boundary line.

2nd Report at 18.

Georgia interprets this passage as a proper application of international law principles to the case at hand. The Special Master is referring to the fact that the strict equidistant line would be measured from points on the closing line[18] across the mouth of the Savannah River as well as from points on Tybee Island and on shoal "Z". A strict use of the equidistance (or in the Special Master's terminology, "proportionality") rule would have unduly penalized Georgia. This is particularly so since the Special Master had previously concluded, based on historic evidence, that the starting point of the lateral seaward

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[18] Georgia agrees with the position of the United States in its Memorandum for the United States as Amicus Curiae that the Special Master's reference to the closing line across the mouth of the Savannah River as a "straight baseline" drawn pursuant to Article 4 of the Geneva Convention, 2nd Report at 13, is incorrect. The expert testimony at trial clearly stated that the line was drawn to close off a juridical bay, T-II-113-14, 253-54, pursuant to Article 7. This mischaracterization of the closing line does not undercut the correctness of the boundary recommended by the Special Master, as the United States acknowledges. U.S. Memorandum at 3.

boundary was in the navigation channel of the Savannah River, rather than its geographic middle. In short, the Special Master compensated for the location of the starting point of the maritime boundary closer to the shore of Georgia than to that of South Carolina by deviating very slightly from the equidistance principle at the line's outer reaches at the edge of the territorial sea, also thereby compensating for the special circumstance of low tide elevation "Z". The line recommended is a perpendicular to the closing line; as such, it is of necessity equidistant from the closest point on the South Carolina side of the closing line and the closest point on the Georgia side of the closing line. T-II-291.

Assuming that the Master's starting point is correct (which Georgia disputes), the Special Master has delineated a perfectly equitable and reasonable lateral seaward boundary between the two states, setting forth a generally equidistant line which takes account of both historic title and special circumstances, as the applicable provisions of international law require.

B. SOUTH CAROLINA'S "COASTAL FRONT" THEORY IS INAPPLICABLE TO DELIMITATION OF A BOUNDARY WITHIN THE TERRITORIAL SEA.

South Carolina seeks to upset the delicate balance of equidistance and special circumstances fashioned by the Special Master. In so doing, however, South Carolina does not take exception to the fact that the Special Master gave no significance to low-tide elevation "Z" or that he rejected the Savannah River navigation channel, per se, as the boundary. Instead, South Carolina contends that the

Special Master's line "cut[s] across" its "coastal front". S.C. Brief at 17. Using large-scale diagrams and maps, South Carolina purports to illustrate that Georgia got a bigger slice of marine territory than it deserves based on geography.

South Carolina's "coastal front" theory of maritime delimitation misstates the applicable international law, obfuscates the relevant geography and muddles a perfectly clear picture of the facts. What is at issue in this case is a lateral seaward boundary between Georgia and South Carolina in the territorial sea, extending out to either 3 or 12 nautical miles. Looking at South Carolina's illustrations one would think that a much larger area was at stake. South Carolina would have the lateral seaward boundary depend upon the geography of the south Atlantic coast from North Carolina to Florida. S.C. Brief at 22. Dr. Lewis M. Alexander, Professor of Geography and Marine Affairs at the University of Rhode Island and former Geographer for the State Department, was qualified as an expert witness and testified that the general direction of the coastal fronts of the two States is relevant to delimitation of maritime boundaries extended over long distances but not to territorial sea boundaries. T-II-126, 151-53, 165; *compare Restatement (Third) The Foreign Relations Law of the United States* § 517 "Delimitation of Exclusive Economic Zone and Continental Shelf" at 73 (1986) *with Restatement, supra,* § 516 "Delimitation of Territorial Sea" at 70. And, indeed, the international cases which South Carolina cites for support of the "coastal front" theory involved the drawing of boundary lines

between nations' exclusive economic zones, out to a distance of 200 nautical miles, or across the continental shelf to a comparable distance.[19]

South Carolina's "coastal front" theory confuses local with regional geography. The Special Master's recommended line, if extended to 200 nautical miles, might appear to be somewhat inequitable for South Carolina. But it has not been extended to that distance. The local configuration of the coast in the Savannah River mouth area, reflected more fairly in the South Carolina Brief at 24, shows that the Special Master's line, far from cutting off South Carolina's local coast, actually works to Georgia's disadvantage, being much closer to the Georgia shore than to the South Carolina shore. As the Special Master has noted, a lateral seaward boundary in the navigation channel would unreasonably cut off Tybee Island and Georgia. 2nd Report at 15 n.109.

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[19] Of the cases cited by South Carolina, S.C. Brief at 27-28, only the *Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary of Norway and Sweden*, 4 Am. J. Int'l L. 226 (1910), included delineation of a boundary within the territorial sea. The Norway/Sweden case was decided long before adoption of the equidistance/special circumstances rule by the Geneva Convention of 1958. In the *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States)*, 1984 I.C.J. 246, a Chamber of the International Court of Justice indeed noted that the "maritime projections" of the two nation's coasts was a key factor in drawing the inner segment of a 200-mile maritime boundary. *Id.* at 331-32. However, the "innermost sector" of the line in question began almost 40 miles beyond the territorial sea. *Id.* at 1207, 1273; T-II-167.

In the final analysis, as the Special Master has held, the task is to make an equitable disposition of the territorial sea adjacent to the two States. 2nd Report at 7, 16. The line recommended fashions an equitable solution, if the Special Master's starting point is correct. South Carolina's exception based on the configuration of a stretch of coast almost 300 miles long is legally unsound; South Carolina's proposed boundary in the navigation channel is palpably inequitable.

CONCLUSION

As presented in Georgia's opening brief, the recommendation of the Special Master regarding the lateral seaward boundary should be disapproved because it originates from an incorrect starting point. In the event that the Court rejects Georgia's contention on that issue, the exception of the State of South Carolina to the recommended lateral seaward boundary should be overruled and the Special Master's recommendation approved. Georgia urges the Court to overrule as well South Carolina's exceptions regarding southeastern Denwill, Horseshoe Shoal and Bird Island.

Respectfully submitted,

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July, 1989

APPENDIX G

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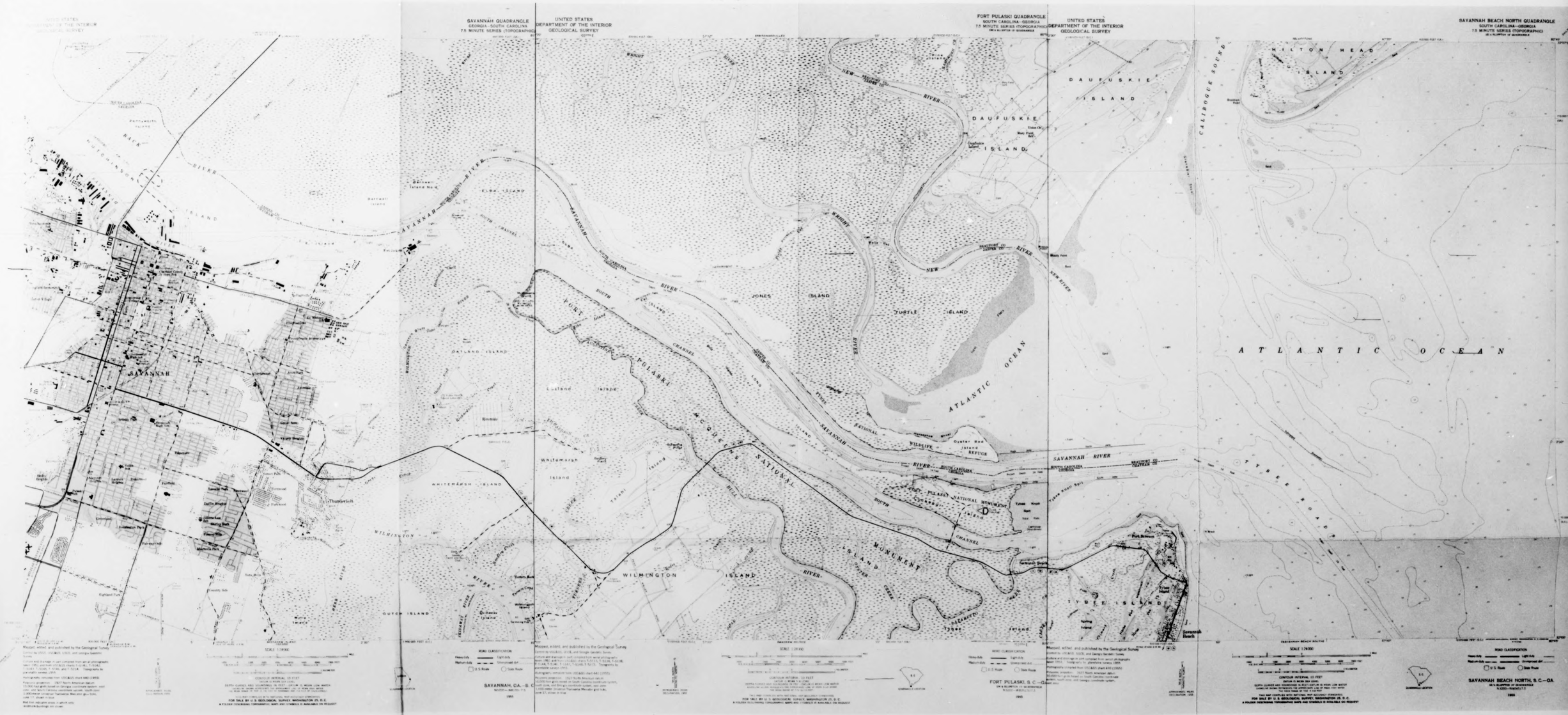
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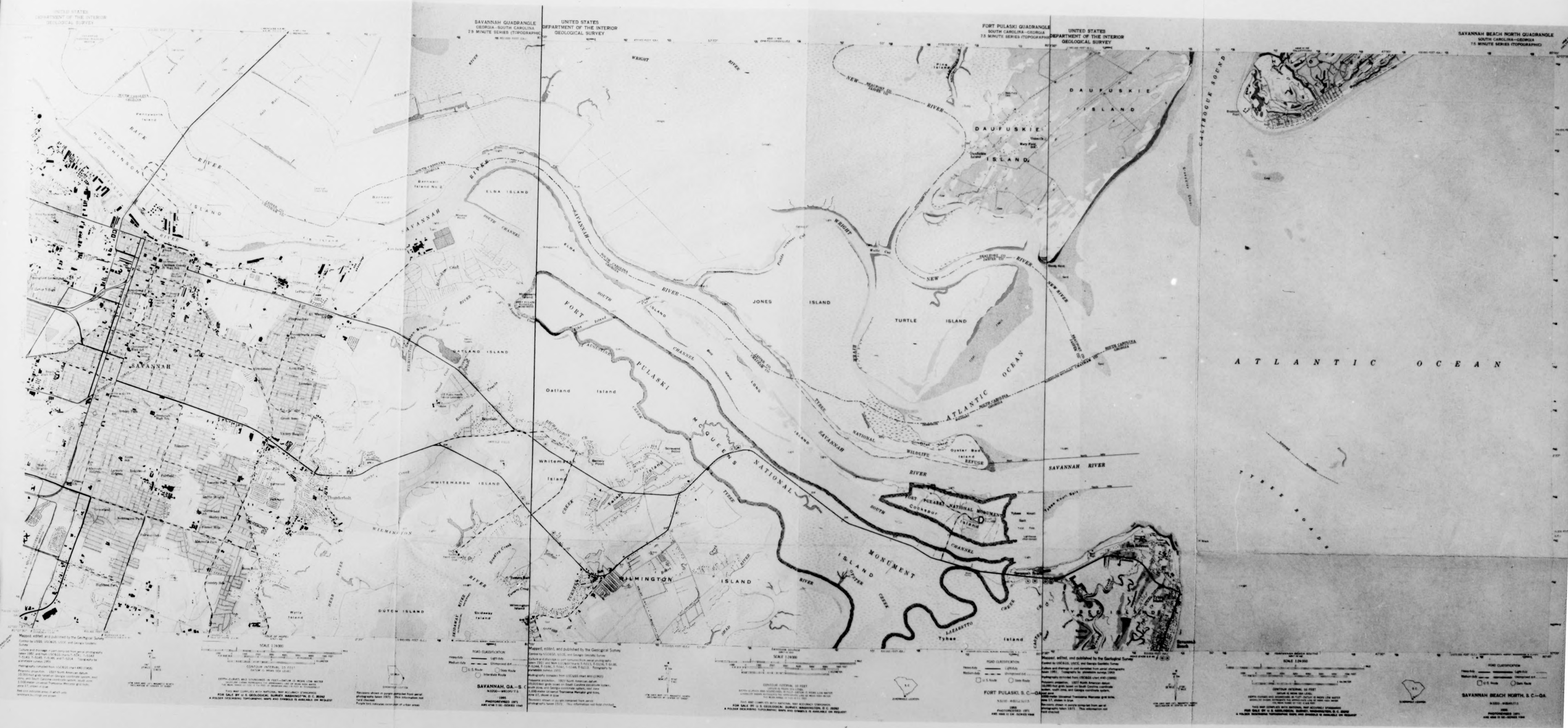
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